



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

FINAL DECISION

December 18, 2012 Government Records Council Meeting

Doug Knehr  
Complainant

Complaint No. 2012-38

v.

Township of Franklin (Somerset)  
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the November 20, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because OPRA contains no specific statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is therefore without authority to impose a statute of limitations where one does not exist, no statute of limitations in OPRA bars the GRC’s adjudication of the Complainant’s Denial of Access Complaint in the instant matter. *See Boudwin, Esq. (on behalf of Milford Board of Education) v. New Jersey Department of Treasury, Division of Administration*, GRC Complaint No. 2011-34 (Interim Order dated August 28, 2012).
2. The proposition that unsolicited contact could result if the Custodian granted access to the requested information holds true here. The Complainant admitted in the Denial of Access Complaint that he planned to use the information to solicit business. Disclosure of this information to the Complainant will clearly result in unsolicited contact with persons that were obligated to provide the requested information in order to be in compliance with local law. As such, the Custodian lawfully denied access to same pursuant to N.J.S.A. 47:1A-1 and Executive Order 21 (Gov. McGreevey, 2002). N.J.S.A. 47:1A-6. *See Bernstein v. Borough of Park Ridge*, GRC Complaint No. 2005-99 (July 2005), *and Faulkner v. Rutgers University of New Jersey*, GRC Complaint No. 2007-149 (May 2008).

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the  
Government Records Council  
On The 18<sup>th</sup> Day of December, 2012

Robin Berg Tabakin, Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: December 20, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 18, 2012 Council Meeting**

**Doug Knehr, Esq.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-38**

v.

**Township of Franklin (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of names, addresses and telephone numbers (if available) for all dog and cat owners in the Township of Franklin (“Township”), also including the type and number of animals.

**Request Made:** July 5, 2010

**Response Made:** July 6, 2010

**Custodian:** Ann Marie McCarthy

**GRC Complaint Filed:** February 14, 2012<sup>3</sup>

**Background**

**July 5, 2010**

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant indicates that the preferred method of delivery is e-mail in a Microsoft® Excel spreadsheet.

**July 6, 2010**

Custodian’s response to the OPRA request. The Custodian responds in writing on the OPRA request form to the Complainant’s OPRA request on the same business day following receipt of such request.<sup>4</sup> The Custodian states that access to the requested records is denied based on a citizen’s reasonable expectation of privacy pursuant to N.J.S.A. 47:1A-1 and Executive Order No. 21 (Gov. McGreevey, 2002)(“EO 21”).

**February 14, 2012**

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching the Complainant’s OPRA request dated July 5, 2010 with the Custodian’s response thereon (undated).<sup>5</sup>

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Louis N. Rainone, Esq., of DeCotiis, Fitzpatrick & Cole, LLP (Teaneck, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> The Custodian certifies in the SOI that she received the Complainant’s OPRA request on July 6, 2010.

<sup>5</sup> The Complainant attached a second (2<sup>nd</sup>) document that is not relevant to the instant complaint.

The Complainant states that he submitted an OPRA request to the Custodian on July 5, 2010. The Complainant states that the Custodian denied access to the responsive information pursuant to OPRA and EO 21.

The Complainant states that he wishes to receive the addresses in order to send marketing material to registered pet owners. The Complainant asserts that possible privacy issues can be addressed by redacting the name, telephone number and type of animal.

The Complainant does not agree to mediate this complaint.

**February 24, 2012**

Request for the Statement of Information (“SOI”) sent to the Custodian.

**February 29, 2012**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated July 5, 2010 with the Custodian’s response thereon (undated).
- EO 21.
- Bernstein v. Borough of Park Ridge, GRC Complaint No. 2005-99 (July 2005).

The Custodian certifies that no search was undertaken since the request was denied pursuant to EO 21 and Bernstein.

The Custodian also certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services. The Custodian certifies that the records have a three (3) year retention schedule and thus the first date on which the records may be destroyed is January 1, 2014.

The Custodian certifies that she received the Complainant’s OPRA request on July 6, 2010. The Custodian certifies that she responded on the same day denying access to the responsive records pursuant to N.J.S.A. 47:1A-1 and EO 21.

The Custodian states that the responsive records are the 2010 listings for dog licenses, which include the names, addresses and telephone numbers of owners as well as the type and number of animals owned. The Custodian asserts that the records are exempt under EO 21 because the Township has “... a responsibility and an obligation to safeguard ... personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy.” *Id.* See also Burnett v. County of Bergen, 198 N.J. 408 (2009). The Custodian further asserts that the Council’s decision in Bernstein wherein the Council determined that names and addresses of dog license owners is exempt from access under OPRA and EO 21 “... because of the unsolicited contact, intrusion or potential harm that may result” is applicable to the instant complaint.

The Custodian's Counsel submits a letter brief in support of the Custodian's position in which she recapitulates the facts.<sup>6</sup>

Counsel first argues that this complaint should be dismissed as untimely pursuant to the Court's holding in Mason v. City of Hoboken, 196 N.J. 51, 68 (2008) (holding that the a 45-day statute of limitations applies to denial of access complaints filed in Superior Court). Counsel states that in Mason, *supra*, the Court reasoned that based on the inclusion of a statute of limitation in the old Right to Know Law and OPRA's expedited time frame within which a custodian must respond, "a requestor should also be required to make a prompt decision whether to file suit." *Id.* at 69. Counsel asserts that the concerns of the Mason Court are equally applicable to the GRC's complaint process: the only difference is the venue. Counsel argues that the Court's imposition of the statute of limitations should also apply to the GRC. Counsel contends that the Township should be entitled to some certainty that beyond a set time period, its actions will not be challenged or potentially penalized. Counsel thus argues that the Complainant's filing 589 days after the denial of access is not reasonable and this complaint should be dismissed.

Counsel next argues that the Complainant's OPRA request sought information rather than an identifiable government record. *See* Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005) and Bart v. Passaic County Public Housing Authority, 406 N.J. Super. 445, 451 (App. Div. 2009). Counsel asserts that although the Custodian treated the Complainant's OPRA request as one for a list of dog licenses issued by the Township, said request actually sought information. Counsel contends that although the responsive list contains some of the information sought, the Complainant's OPRA request is ultimately invalid and this complaint should be dismissed.

Counsel further argues that assuming the OPRA request is deemed to be valid, the Custodian lawfully denied access to the responsive list containing information the disclosure of which would violate a citizen's reasonable expectation of privacy. Counsel states that OPRA obligates a public agency to safeguard this type of information where disclosure would "... run contrary to reasonable privacy interests." Burnett, *supra*, at 423. Counsel states that in the Burnett Court conducted used the following factors to evaluate a claim of privacy:

"(1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an ex-press statutory mandate, articulated public policy, or other recognized public interest militating toward access." (*citing* Doe v. Poritz, 142 N.J. 1, 88, 662 A.2d 367 (1995)) *Id.* at 427.

Counsel states that in Bernstein, *supra*, the Council conducted the same balancing test on a request seeking dog license information and determined that the records were exempt from disclosure. Counsel states that the Council reasoned that:

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<sup>6</sup> Counsel notes that although the Complainant's OPRA request sought information, the Custodian treated the request as one seeking a listing of dog license holders.

“[p]ermitting access to such records allows any recipient of the record to ascertain which homes are protected by or have dogs and which do not have dogs. Although the Complainant has indicated that the records are to be used in business solicitation, the release of this information could potentially jeopardize the safety and security of citizens and their property, as well as their dogs ... The potential for theft, physical harm, vandalism and burglary is a concern in determining the disclosure because it allows the requestor access to personal information regarding the dog owner and their property that may not otherwise be disclosed to the public ... The release of the requested names and addresses, further, has the potential for harm to citizens who own valuable dogs. Dogs of certain breeds may become potential targets for threats, theft and physical harm simply because of their breed.” *Id.*

Counsel states that the Complainant may attempt to rely on the Appellate Division’s decision in Atl. County SPCA v. City of Absecon, Docket No. A-3047-07T3 (App. Div. 2009). Counsel notes that there, the Court granted plaintiff access to similar records after conducting a balancing test. Counsel asserts that although the unpublished decision is not binding on the GRC, the decision was limited to the specific facts of that complaint. Counsel states that the Court, in conducting the balancing test, was swayed by plaintiff’s role as a governmentally chartered organization authorized to enforce animal cruelty laws. Counsel states that the disclosure of the records also rested on plaintiff’s stated use for the information in order to further its public purpose.

Counsel contends that the Complainant here has stated no need analogous to that in ASPCA. Counsel states that the Complainant himself stated in the Denial of Access Complaint that he wished to use the information for commercial marketing purposes. Counsel contends that in the absence of the need found in ASPCA, *supra*, the Council should determine that the Custodian lawfully denied access to the requested information.

### Analysis

#### **Is there a forty-five (45) day statute of limitations for filing a Denial of Access Complaint with the GRC?**

The Custodian’s Counsel asserted in the SOI that the Complainant did not timely file the instant Denial of Access Complaint. Counsel stated that the Complainant filed this complaint 589 days after the Custodian denied access to the responsive records. Counsel contended that the GRC should apply the Supreme Court’s holding in Mason v. City of Hoboken, 196 N.J. 51 (2008) and dismiss this complaint as untimely.

In, Mason, *supra*, the Court determined that the appropriate statute of limitations for filing a denial of access complaint *in Superior Court* was 45 days from the date of the Custodian’s denial of access. The Court noted that this statute of limitations was consistent with the limitations period in actions in lieu of prerogative writs. *Id.* The Court noted that “the former Right to Know Law specifically directed that litigants headed to

Superior Court should proceed via an action in lieu of prerogative writs. N.J.S.A. 47:1A-4 (repealed 2002). That language does not appear in OPRA. See N.J.S.A. 47:1A-6.” *Id.*

The Court further noted that

“The Legislature plainly stated that requestors denied access to public records may file an action in Superior Court or a complaint before the GRC. N.J.S.A. 47:1A-6. Those matters ‘shall proceed in a summary or expedited manner.’ *Ibid.* Beyond that, the Legislature specifically deferred to the Supreme Court to adopt court rules ‘necessary to effectuate the purposes of this act.’ N.J.S.A. 47:1A-12. The Legislature’s action was consistent with our Constitution, which vests this Court with the authority to create procedural rules *for court practices*. See N.J. Const. art. VI, § 2, P 3; Winberry v. Salisbury, 5 N.J. 240, 255, 74 A.2d 406 (1950).” 196 N.J. 68 [Emphasis added].

The Court therefore held that:

“... requestors who choose to file an action *in Superior Court* to challenge the decision of an OPRA custodian must do so within 45 days ...” *Id.* at 70. (emphasis added.)

Thus, the Court’s holding in Mason, *supra*, is limited to Denial of Access Complaints filed in the Superior Court of New Jersey.

The New Jersey Legislature is empowered to delegate to an administrative agency the authority to promulgate rules and regulations interpreting and implementing a statute. An appellate court will defer to an agency’s interpretation of a statute unless it is plainly unreasonable. The presumption of validity, however, is not without limits. If an agency’s statutory interpretation is contrary to the statutory language, or if the agency’s interpretation undermines the Legislature’s intent, no deference is required. An appellate court’s deference does not go so far as to permit an administrative agency under the guise of an administrative interpretation to give a statute any greater effect than is permitted by the statutory language. See, Reilly v. AAA Mid-Atlantic Ins. Co. of New Jersey, 194 N.J. 474 (2008).

OPRA contains no statute of limitations on Denial of Access Complaints filed with the GRC. The GRC is therefore without authority to impose a statute of limitations where one does not exist. Thus, no statute of limitations in OPRA bars the GRC’s adjudication of the Complainant’s denial of access complaint in the instant matter.

Because OPRA contains no specific statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is therefore without authority to impose a statute of limitations where one does not exist, no statute of limitations in OPRA bars the GRC’s adjudication of the Complainant’s Denial of Access Complaint in the instant matter. See Boudwin, Esq. (on behalf of Milford Board of Education) v. New Jersey Department of Treasury, Division of Administration, GRC Complaint No. 2011-34 (Interim Order dated August 28, 2012).

## Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions*... a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA further provides that:

“The provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant ... any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; *Executive Order of the Governor*; Rules of Court; any federal law; federal regulation; or federal order.” (Emphasis added.) N.J.S.A. 47:1A-9.a.

EO 21 provides that:

“[i]n order to effectuate the legislative directive that a public governmental agency has the responsibility and the obligation to safeguard from public access a citizen's personal information with which it has been entrusted, an individual's home address and home telephone number, as well as his or her social security number, shall not be disclosed by a public agency at any level of government to anyone ...” *Id.*

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records



responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Complainant herein sought the “names, addresses and telephone numbers for all dog and cat owners in the Township of Franklin (“Township”), also including the type and number of animals.” The Custodian responded denying access to this information pursuant to N.J.S.A. 47:1A-1 and EO 21.

In the Denial of Access Complaint, the Complainant argued that the Custodian could address privacy issues by redacting all information except the addresses. The Complainant further noted that he sought at least the addresses in order to send out marketing materials. In the SOI, Counsel argued, among other things, that the Complainant’s OPRA request was extremely similar to the request at issue in Bernstein, supra, and several other complaints decided by the GRC around the same time. Counsel further distinguished this complaint from ASPCA, supra, noting that the Complainant admitted he would use the addresses as a commercial tool whereas the ASPCA had a public purpose to receive the same types of records.

In Merino v. Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004), the Council addressed the citizen’s reasonable expectation of privacy pursuant to N.J.S.A. 47:1A-1 and found that the Appellate Division held that the GRC must enforce OPRA's declaration, in N.J.S.A. 47:1A-1. (“a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy.” Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 368-69 (App. Div. 2003)). *See also* National Archives and Records Administration v. Favish, 541 U.S. 157, 124 S.Ct. 1570 (U.S. March 30, 2004)(personal privacy interests are protected under FOIA).

The New Jersey Supreme Court has indicated that, as a general matter, the public disclosure of an individual's home address “does implicate privacy interests.” Doe v. Poritz, 142 N.J. 1, 82 (1995). The Court specifically noted that such privacy interests are affected where disclosure of a person's address results in unsolicited contact. The Court quoted with approval a federal court decision that indicated that significant privacy concerns are raised where disclosure of the address “can invite unsolicited contact or intrusion based on the additional revealed information.” *Id.* (citing Aronson v. Internal Revenue Service, 767 F.Supp. 378, 389 n. 14 (D. Mass. 1991)).

The GRC will in complaints where privacy interests are at issue, ask the parties to submit balancing test questionnaires in order to determine whether the complainant’s need outweighs the public agency’s right of confidentiality. Here, the GRC has received enough evidence to make a determination absent the questionnaires.

Specifically, the facts of this complaint fall squarely within settled GRC case law. As the Custodian and Counsel noted in the SOI, this complaint is similar to Bernstein v. Borough of Park Ridge, GRC Complaint No. 2005-99 (July 2005) because the records sought in both complaints were dog license information. Additionally, both the

complainant in Bernstein, *supra*, and the Complainant herein admitted to needing the records for commercial use. In Bernstein, *supra*, the Council, partly taking into account that the complainant planned to use the dog license information to solicit business, determined that disclosure would elicit unsolicited contacts with the citizens. Thus, the Council determined that the custodian lawfully denied access to the information.

Moreover, in Faulkner v. Rutgers University of New Jersey, GRC Complaint No. 2007-149 (May 2008), the complainant sought access to season ticket holder information for the University's football and basketball teams. The custodian denied access based on privacy interest, which led to the filing of a complaint. In the balancing test questionnaire, the complainant stated that he wanted to addresses in order to conduct a geographical survey of distribution of season tickets. The Council, citing to Avin v. Borough of Ramsey, GRC Complaint No. 2004-181 (March 2005), determined that disclosure of the records could lead to unsolicited contact and thus the custodian lawfully denied access to same.

The facts of this complaint, as pointed out by the Custodian's Counsel, are inapposite to those in Atl. County SPCA v. City of Absecon, Docket No. A-3047-07T3 (App. Div. 2009). Specifically, as noted by the Counsel, the ASPCA is a governmentally chartered organization statutorily authorized to enforce animal cruelty laws and was seeking access to further this public purpose. Conversely, the Complainant herein has no such authorization and admitted that he sought to market a product or service to the owners.

The proposition that unsolicited contact could result if the Custodian granted access to the requested information holds true here. The Complainant admitted in the Denial of Access Complaint that he planned to use the information to solicit business. Disclosure of this information to the Complainant will clearly result in unsolicited contact with persons that were obligated to provide the requested information in order to be in compliance with local law. As such, the Custodian lawfully denied access to same pursuant to N.J.S.A. 47:1A-1 and EO 21. N.J.S.A. 47:1A-6. See Bernstein, *supra*, and Faulkner, *supra*.

The GRC declines to address whether the Complainant's OPRA request was invalid because the Custodian identified records and the GRC has determined that she lawfully denied access to those records.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because OPRA contains no specific statute of limitations on Denial of Access Complaints filed with the GRC, and because the GRC is therefore without authority to impose a statute of limitations where one does not exist, no statute of limitations in OPRA bars the GRC's adjudication of the Complainant's Denial of Access Complaint in the instant matter. See Boudwin, Esq. (on behalf of Milford Board of Education) v. New Jersey Department of Treasury,

Division of Administration, GRC Complaint No. 2011-34 (Interim Order dated August 28, 2012).

2. The proposition that unsolicited contact could result if the Custodian granted access to the requested information holds true here. The Complainant admitted in the Denial of Access Complaint that he planned to use the information to solicit business. Disclosure of this information to the Complainant will clearly result in unsolicited contact with persons that were obligated to provide the requested information in order to be in compliance with local law. As such, the Custodian lawfully denied access to same pursuant to N.J.S.A. 47:1A-1 and Executive Order 21 (Gov. McGreevey, 2002). N.J.S.A. 47:1A-6. See Bernstein v. Borough of Park Ridge, GRC Complaint No. 2005-99 (July 2005), and Faulkner v. Rutgers University of New Jersey, GRC Complaint No. 2007-149 (May 2008).

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

November 20, 2012<sup>7</sup>

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<sup>7</sup> This complaint was prepared and scheduled for adjudication at the Council's November 27, 2012 meeting; however, said meeting was cancelled due to lack of quorum.